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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/555,725	11/07/2005	Arthur Day	3712036-00678	9932
29157	7590	04/29/2010	EXAMINER	
K&L Gates LLP P.O. Box 1135 CHICAGO, IL 60690			DEGUIRE, KATHERINE E	
			ART UNIT	PAPER NUMBER
			1781	
			NOTIFICATION DATE	DELIVERY MODE
			04/29/2010	ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

chicago.patents@klgates.com

Office Action Summary	Application No. 10/555,725	Applicant(s) DAY ET AL.	
	Examiner Katherine DeGuire	Art Unit 1781	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 08 January 2010.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-32 is/are pending in the application.
- 4a) Of the above claim(s) 15-32 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-14 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|---|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

The 103 rejections of claims 1-14 over Crook are maintained. The 112 rejection of claim 4 is withdrawn due to applicant's amendment.

Claim Rejections - 35 USC § 103

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 1-14 remain rejected under 35 U.S.C. 103(a) as being unpatentable over Crook.

The rejection over Crook is cited in the previous action.

Response to Arguments

Applicant's arguments filed 01/08/2010 have been fully considered but they are not persuasive.

The applicant argues that the fat based confectionery has the properties of a surface area to mass ratio that is greater than 8.0cm^2 and at least one strand having a continuous length that is greater than 80mm. The applicant further argues that these properties provide a "remarkable temporary, more rapid melt-in the mouth ability" than the composition of Crook. However, the applicant does not specifically claim these properties nor does he describe how these properties are measured. The office does not have test facilities in order to determine all the properties of a given composition, especially when the "melt-in-mouth" property is

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not clearly defined or claimed. Ultimately, the applicant has not provided any evidence as to why the composition of Crook would not possess the "melt-in the mouth" property.

Furthermore, the applicant argues that the claimed composition has "more rapid melt-in-the mouth ability." However, the applicant does not define how much of an improvement and the standard to which the composition is being compared.

The applicant argues that the length of the strand is not purely an aesthetic design choice because a long strand can occupy a high volume which allows the composition to "melt in the mouth more quickly." As argued above, the applicant does not claim this property nor does he properly define it. However, it would have been obvious to include various sizes of chocolate strands in order to accommodate various products. Furthermore, it would have been obvious to maximize the surface area of the composition in order to maximize mouth feel and flavor transfer. This concept is well known in other confections such as taffy.

The applicant argues that Crook defines the "flexibility" of the chocolate as its ability to be cut cleanly which is in contrast to the applicant's definition of flexibility referring to "a 15 cm section of the extrudate strand that can be brought from a substantially straight position to a position where the two ends have been bent round to touch each other without the material developing a visible crack, substantially altering its cross-section or breaking apart." However, Crook teaches that the chocolate can be extruded under high pressure in a plastic, or non pourable state. Crook also teaches that the chocolate is capable of retaining

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its shape and has a temporary flexibility or plasticity enabling it to be physically manipulated, cut, or plastically deformed before losing its flexibility (column 1, line 40-47). Crook does teach that the chocolate can be cut cleanly but does not limit the definition of flexibility to just this property. Furthermore, the ability to be cut cleanly and the applicant's definition of flexibility are not mutually exclusive.

Crook teaches that the extruded strand of chocolate is flexible, can be physically manipulated, and retains its shape. Thus, one of ordinary skill in the art would expect the composition to be able to be brought from a substantially straight position to a position where the two ends have been bent round to touch each other without the material developing a visible crack, substantially altering its cross-section or breaking apart. The office does not possess lab facilities to test the composition and the applicant has not provided clear and convincing evidence that the composition of Crook does not possess the claimed "flexibility."

Conclusion

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be

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calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Katherine DeGuire whose telephone number is (571)270-1136. The examiner can normally be reached on Monday through Friday 9-5:30 EST.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on 571-272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Katherine DeGuire/
Examiner, Art Unit 1781

/Keith D. Hendricks/
Supervisory Patent Examiner, Art Unit 1781